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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 499.

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs.

ROY H. BEELER, Attorney General of the State of Tennessee, et. al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

## REPLY BRIEF OF APPELLANT, MEMPHIS NATURAL GAS COMPANY.

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Appellant attempted clearly to etch from the record the actual case of a pipe line company engaged solely in the interstate transportation and sale of gas and incidental thereto reducing the pressure and metering the gas for purposes of delivery, and maintaining a Tennessee office wherein business was transacted which related solely to this interstate transportation and sale.

Appellees in their brief have sought to overlay this picture with the insistence that appellant was engaged in making "sales direct to *consumers* on demand in Tennessee" (Appellees' Brief, pp. 4, 20) and that the "price was ascertained by a reading of the meter in each individual burner tip user's home", etc. (Appellees' Brief, p. 3.)

Moreover, it is stated that in the Tennessee office the business included "the lending of money, the purchase of oil well shares." (Appellees' Brief, p. 5.)

Apparently the statement that appellant was engaged in supplying local consumers on demand was intended to bring the case within the language of this Court in *Missouri, ex rel, Barrett vs. Kansas Natural Gas Company*, 265 U. S. 298, wherein, discussing the activities of a typical local distributing company, this Court said:

> "The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another State, and drawn for distribution directly from interstate mains."
>
> (265 U. S. 298, at 309.)

Neither this statement, however, nor the other statements in Appellees' brief, to which we referred, are supported by the record. Appellant was not engaged in distributing gas to local consumers. It distributed no gas to any consumer. Memphis Power & Light Company did tap appellant's main line at Brooks Avenue and did transport the gas through its own pipe line to Kansas Avenue, at which point Memphis Power & Light Company distributed the gas to itself, part to its generating plant for consumption and part to its lines for distribution.

Appellant did not supply gas "on demand", in the sense in which that expression is used in *Missouri, ex rel Barrett vs. Kansas Natural Gas Company,* and in which it is sought to be applied in appellees' brief. That expression as used by this Court relates to the method of distribution of a local distribution company. Such a company has gas in its mains at all times at rest so far as the household consumer is concerned. That consumer at will turns off any or all of his jets and turns them on as he desires to use the gas. Such a consumer may at his pleasure use no gas for any period of time and may resume its use at will. It is in recognition of the obligation of a local distributor to be at all times ready to supply this kind of service that such a distributor is permitted in many cases to set up as a part of his rate schedule what is known as a "demand charge."

No such situation at any time existed in the case at bar. The gas at all times was in continuous flow from appellant's main line into the lines of Memphis Power & Light Company and West Tennessee Power & Light Company. (R. pp. 40, 41, 108, 157.) It is true that this was not at all times an equal flow because some hours were "peak hours" and others normal hours. It is also true that appellant sought so far as it could by keeping in touch with the situation to know when to anticipate these "peaks." This is entirely a different situation from one where the gas is brought in and held in readiness to supply on demand.

Manifestly this situation does not justify the statement in appellees' brief (p. 10) that "this gas was delivered on orders received hourly in appellant's Memphis office." Orders were not received hourly in appel-

lant's office and there is not a scintilla of evidence in the record justifying such a statement. The only "order" was the contract between Memphis Natural Gas Company and Memphis Power & Light Company and West Tennessee Power & Light Company. To fulfill these contracts, appellant kept in touch with the situation from day to day, but the contracts were not supplemented in any sense by additional orders or demands from either Memphis Power & Light Company or West Tennessee Power & Light Company.

The statement that the price was ascertained "by reading of the meters at each individual burner tip user's home", etc., without explanation, is misleading. Apparently this statement is based upon the fact that the prices charged by appellant to Memphis Power & Light Company for the gas were ascertained by the aggregate amount used by Memphis Power & Light Company for specific purposes, which amount in turn was determined by the reading of the consumers' meters by Memphis Power & Light Company. No meter of any household consumer was read by appellant and the information as to the use was obtained by Memphis Natural Gas Company from the reports and books of Memphis Power & Light Company.

Nothing in the record justifies a statement that the Memphis office of the appellant did anything except the work necessary in relation to the interstate transportation and sale of gas.

Appellees add to this "the lending of money." (Appellees Brief, p. 5.) The record does not show that appellant's Memphis office was engaged in lending money

during the period in question. It does show that appellant borrowed money from Mississippi Power & Light Company and Arkansas Power & Light Company, to make extensions desired by those companies. There is no evidence in the record that either of these transactions was ever discussed in the Memphis office. Appellees also state that the Memphis office was concerned with "the purchase of oil well shares." There is no evidence in the record that appellant purchased any oil well shares in the years 1932 to 1935, inclusive. It did not purchase any oil well shares in those years and the record affirmatively shows that this oil transaction was in the year 1937. (R. p. 118.)

The statement that "other activities" were carried on in the Memphis office is purely gratuitous. There were no other activities. (R. p. 44.)

When the blur caused by these encrusting statements is removed, the lines of the picture sharply reappear:. Appellant was engaged solely in interstate transportation and sale of gas. Its acts in keeping informed as to the situation, in metering the gas and in reducing the pressure, were purely incidental to this interstate business.

Tending to confuse also is appellees' statement that appellant supplied gas to *consumers*. If language is used with precision, it cannot be accurately said that appellant *supplied* or *distributed* gas to *any* consumer. It is true that Memphis Power & Light Company consumed part of the gas which it received. No other person, firm or corporation received any gas from Memphis Natural Gas Company which it consumed. Memphis Natural Gas Company did not distribute to Memphis Power & Light

Company gas which that company consumed. Memphis Power & Light Company tapped Memphis Natural Gas Company's main line and distributed the gas to itself.

The mere fact that Memphis Power & Light Company took from Memphis Natural Gas Company's main line gas which it eventually consumed in its generating plant does not stamp the business of Memphis Natural Gas Company as an intrastate business. This we discussed in our original brief and should not again refer to it except for the fact that it seems to us that the question is set at rest by the recent opinion of this Court in *Illinois Natural Gas Company vs. Central Illinois Public Service Company, et al.* (Decided Jan. 5, 1942, No. 100, Oct. Term, 1941.)

It is true that the decision in that case was rested on the fact that Congress, by enacting the Natural Gas Act, had regulated the interstate activity there under consideration. It is also true that this Court found it necessary to consider whether the activities of the Illinois Natural Gas Company were such activities as had been defined to be interstate prior to the passage of this Act. It did so find, saying:

> "Appellant engages in interstate commerce in gas and in its interstate transportation as those terms had been defined by this Court, before the adoption of the Act."

The activities of the Illinois Natural Gas Company included sale and delivery to consumers, for the Court said:

> "It also sells and delivers gas to several industrial consumers in the state. The gas moves continuously,

> under pressure applied by Panhandle, from the gas fields until it enters appellant's transmission lines where appellant reduces the pressure according to the needs of its service."

In arriving at its conclusion that the pipe line company's business was interstate, this Court reaffirmed by approving citation the very cases on which appellant here relies.

*Illinois Natural Gas Company vs. Central Illinois Public Service Company, et al.*, thus definitely holds that the consumption of natural gas by one who obtains it from an interstate pipe line does not render the business of the pipe line company intrastate business.

Inasmuch as Memphis Power & Light Company is the only person, firm or corporation in Tennessee which consumes any gas which it receives *directly* from Memphis Natural Gas Company, the use of the plural by appellees in speaking of "consumers" can only mean that this is an implied insistence that Memphis Natural Gas Company was distributing that gas which the customers of Memphis Power & Light Company received from the distribution lines of Memphis Power & Light Company. This, of course, is rested upon the claim that Memphis Natural Gas Company and Memphis Power & Light Company shared profits. No authority is cited, no argument is made, that even if there were a sharing of profits, this would make Memphis Power & Light Company the *alter ego* of Memphis Natural Gas Company. It is merely assumed that this would be the case. Thus there is a lacuna in appellee's brief because it does not attempt to show why, even if there were a sharing of profits between the

two companies (which we insist there was not), this would mean that Memphis Natural Gas Company was engaged in intrastate business because Memphis Power & Light Company was so engaged. We have pointed out already that this would, in no sense, follow where the corporations which shared the profits are separate corporate entities, independently managed and where one is not dominated by the other. In the brief filed in this Court by the appellees, no insistence is made in regard to any dominating control by Memphis Power & Light Company over Memphis Natural Gas Company, or vice-versa.

It is an understatement to say that appellees' discussion of the nature of the tax here involved does not make for clarity. We have already pointed out in our original brief that this is a tax on the privilege of *doing* business. It is not a tax upon the *right to do* business. The Supreme Court of Tennessee, in the cases cited in our original brief, has definitely so held, and no attempt is made to impune the authority of these cases. The two quotations in Appellees' Brief (p. 9) from the case of *Bank of Commerce & Trust Co. vs. Senter*, 149 Tenn. 569, do not contravene our insistence when placed in their setting and considered with the entire opinion. Nevertheless, the attempt is made (Appellees' Brief, pp. 16 and 17) to escape the binding authority of *State Tax Commission vs. Interstate Natural Gas Co.*, 284 U. S. 41, by suggesting the tax here involved is not the kind of tax there involved, but is the kind of tax involved in *Stone vs. Interstate Natural Gas Co.*, 103 Fed. (2d) 544, Affd. per curiam 308 U. S. 522.

It is only necessary to state that in the case of *State Tax Commission vs. Interstate Natural Gas Co.*, as in

the case at bar, the tax was one on the privilege of *doing* business, while in *Stone vs. Interstate Natural Gas Co.*, the tax was on the *right to do* business. In the latter case the Circuit Court of Appeals for the Fifth Circuit said:

> "We think the tax is laid on a domestic organization because of its mere existence capitalized and ready to carry on its corporate activities. It need not do anything to incur it."
>
> (103 Fed. (2d) at 548.)

And again:

> "The resident could not escape the tax by engaging in interstate commerce."
>
> (At 549.)

The question involved in the instant case is not whether the State of Tennessee could tax the corporate existence of Memphis Natural Gas Company and its right to do business in Tennessee. That is not what it taxes or attempts to tax by the statutes here involved. What it does attempt to tax by these statutes, as construed and applied by the Supreme Court of Tennessee, is the actual doing of business. This we insist it cannot do because a privilege tax cannot be levied on the privilege of engaging in interstate commerce. This because the doing of interstate commerce is a privilege that emanates from the federal power and not from the state power. It therefore can be taxed by the federal power and not by the state power. The right to engage in an intrastate business in a state, whether that right is exercised or not, emanates from the state power and can be taxed by the state power, but this situation is not presented by the case at bar.

While the question does not seem to us to be here involved, it is clear that the imposition of such a tax would interfere with the execution of a national policy because it would permit the state to tax as a privilege it conferred the privilege of engaging in interstate commerce with which it has no concern and which is not derived from any state power.

## CONCLUSION.

Viewed in proper perspective all of appellant's activities — keeping itself informed as to the amount of gas it was required by its contract to deliver, metering, reducing pressure, work of the Memphis office — are seen to be limited to those things which were not only incidental but necessarily and inescapably incidental to its sole business of transporting and selling gas in interstate commerce.

The nature of that business was not changed by the fact that a distinct and independent corporation, Memphis Power & Light Company, was engaged in distributing this gas to consumers, notwithstanding the fact that the amount appellant received for the gas sold under its contract with that company might vary in accordance with the results of the business done by Memphis Power & Light Company.

The Supreme Court of Tennessee held that the privilege of engaging in this interstate commerce could be taxed by the state of Tennessee, arriving at this conclusion as the result of an erroneous conception of what is in fact interstate commerce. It is for this Court to correct that misconception as to the nature of appellant's

business, and if (as we insist) that business is solely an interstate business, then the privilege of doing that business cannot be taxed. Else every state would have the same unrestricted license to burden interstate commerce with privilege taxes which they all possessed prior to the adoption of the Constitution of the United States. It was to prevent the abuse of this power that the interstate commerce clause was included in the Constitution.

Respectfully submitted,

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